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THE RISK MANAGER

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2009 ANNUAL POLICYHOLDERS' MEETING

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 7:00 am, Wednesday, June 10th at the Marriott River Center Hotel, 10 West River Center Blvd, Covington, Kentucky. Please check the hotel event listing for room location. Included in the items of business are the election of a class of the Board of Directors and a report on Company operations. Proxy materials will be mailed to policyholders prior to the meeting. We urge all policyholders to return their proxy and to attend the meeting.

21 Since 1987

"There are two things to aim at in life: first, to get what you want; after that to enjoy it. Only the wisest of mankind achieve the second."

Logan Pearsall Smith

Fee Disputes and Legal Malpractice

In a panel presentation at the 7th Annual Legal Malpractice Risk Management Conference last year it was observed that 15-20% of all malpractice claims are in the form of counterclaims that started out as a simple collection action by a law firm. Most often these counterclaims involve small law firms that can least afford a cash flow interruption and, therefore, are motivated to sue for fees. Given the difficult economic times we are in, it is expected that more firms than ever of all sizes will be motivated to begin collection actions against non-paying clients. Thus, it is ripe to review those things you should consider before filing a collection action and ways of avoiding a fee dispute in the first place.

Suing a Client for Fees is Like Playing Leapfrog With A Unicorn

Malpractice counterclaims, while often lacking merit, are onerous to defend, can be expensive, and hurt firm morale. Typically, individuals and small businesses bring them. Motivation for the claim often is that the client cannot pay fees, is seeking leverage for a fee adjustment; or may be able to pay fees, but was surprised or disappointed in the outcome of the matter.

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A good policy is to avoid suing clients for fees, but when seriously considering bringing a collection action, use the following checklist to evaluate how counterclaim proof you are:

- Was a good result obtained in the underlying case?
- Is the size of the fee sufficient to warrant the risk of a malpractice counterclaim?
- Has a disinterested lawyer of experience reviewed the file for malpractice?
- How reasonable were your fees?
- Will work on the matter as reflected on billing withstand cross-examination?
  - Does billing indicate over-practicing?
    - Too many meetings, telephone calls, and research hours.
    - Billing for several lawyers reviewing or preparing to discuss the file.
    - Over-qualified personnel for the work.
  - Are entries vague?
    - No names and no billing rates for the work done.
    - Itemized bills use generic terms such as "phone call" or "meeting" with no substantive information.
  - Subject to being misconstrued?
    - Billing for "soft costs" (copying, fax) and general overhead (heat, air conditioning).
    - All telephone calls take .3 hours; all dollar amounts are nice round numbers or end in five; and inserted along with all the routine itemized expenses is a charge for expert witness fees of several thousand dollars.
- How much non-billable time will be spent defending any malpractice counterclaim?
- Will any judgment obtained be collectible?
- Will you recover more than you spend?

Avoid Fee Disputes Using Good Risk Management Techniques

- *Begin with good new client screening procedures.* Red flags are:
  - The financial condition of the prospective client is problematic.
  - The prospective client is difficult when discussing fees.
  - The prospective client has unrealistic expectations for the matter.

- *Maintain good client communications throughout the representation.* Begin with a letter of engagement that includes the fee agreement in detail. In the letter clearly spell out the method of billing and the scope of engagement.

- *Make fee collection as easy as possible.* Get a retainer at the inception of the representation and insist on timely replenishment of the retainer as it is depleted. Accept credit card fee payments.

- *Bill regularly and use descriptive invoices.*
  - Use itemized billings so that the client can tell what is being done on his behalf.
  - Bill periodically, preferably monthly.
  - Keep an accurate time log reflecting daily efforts expended on behalf of the client.
  - Do not change the fee terms in the middle of a matter.

- *Manage client expectations.* Lawyers understandably do not like to send letter after letter to a client about unfavorable developments in their matter that may be taken to be excuses for poor work. Failure to do so, however, results in unreasonable expectations that when not realized can lead to the client not paying fees. One lawyer in discussing this issue said it is essential that all bad developments be promptly communicated to a client in what he calls CYA letters. In this case CYA does not stand for what you may be thinking – rather it means "Change Your Attitude."

- *Catch problems early.* By billing regularly it becomes clear early on whether a client will be difficult about paying fees. Prompt withdrawal is often the best risk management in these circumstances. Accept a small loss and move on. Always do a fee payment review before filing a case. Once a case is filed it is more difficult to withdraw.

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In some cases, notwithstanding the hardship to the lawyer, a judge may rule that the lawyer must continue the representation. Do not put yourself in that position if you can possibly avoid it.

- *Read SCR 3.810, Legal Fee Arbitration.* "The purpose of Rule 3.810 is to establish a procedure whereby fee disputes between attorney and client and fee disputes between attorneys may be resolved by submission to binding arbitration."

Plaintiff's Lawyers Can Be Individually Liable When Judgment or Settlement Proceeds Owed to Medicare Are Not Paid

Some lawyers apparently believe that:

- The Medicare Secondary Payer Statute is limited to Workers' Compensation Claims.
- Medicare will not look to plaintiff's lawyers for payment of their client's debt to Medicare.
- Medicare will not bring recovery actions for money owed from small settlements.

If you believe this to be the case, we urge you to read *U.S. v. Harris* (Civ.Act. No.5:08CV102, U.S.Distr. Ct., No. Distr. of W. Va., 11/13/2008).

Harris represented a client who suffered injuries when he fell off a ladder bought from a local retailer. He was retained after the Centers for Medicare and Medicaid (CMS) paid the client's Medicare claims of $22,549.67. Payment was conditioned on CMS' right of recovery from any entity responsible for making primary payment.

Harris obtained a settlement from the ladder retailer of $25,000. He notified Medicare of the settlement and of his attorney's fees and costs. Medicare then determined that it was owed $10,253.59. When this was not paid within the statutorily-required sixty-day time period, Medicare brought an action against Harris for $11,367.78 that included an interest charge and a denial of a portion of his attorney fees and costs.

Harris moved to dismiss the case because "a lawyer, in representing a client, cannot be held individually liable … when he … distributes settlement funds with the knowledge and consent of the government." He argued that since he provided the details of the settlement to Medicare, the settlement funds were distributed to his clients with the Medicare's knowledge and consent, and he is, therefore, not individually liable to repay the debt.

The Court found Harris' argument to be without merit. The Court's key findings were:

> "The federal regulations … provide the entities in which the government can recover primary payments:
>
> > Recovery from parties that receive primary payments. CMS has a right of action to recover its payments from any entity, including a beneficiary provider, supplier, physician, **attorney**, State agency or private insurer that has received a primary payment. 42 C.F.R. § 411.24(g) (emphasis added)."

"In this case, [the client] and the defendant received a $25,000.00 settlement and primary payment from the ladder retailer. Because the ladder retailer took responsibility for the payment of [the client's] medical services, demonstrated by 'a payment conditioned upon the recipient's compromise, waiver, or release …' the government can now seek reimbursement for the medical services paid for by Medicare. Furthermore, because the government can recover such payments "from any entity that has received payment from a primary plan," including an attorney, the defendant's argument that he cannot be held individually liable to reimburse the government … is without merit." *(citations omitted)*

We have previously offered risk management advice on avoiding liability for unpaid Medicare debts. Now seems like a good time for a review.

- Read *Harris* – This case clearly explains an attorney's exposure for repayment of a client's Medicare payments complete with statutory and regulatory citations.

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- Advise eligible Medicare clients at the inception of a personal injury representation that any recovery may be reduced because recovered medical expenses for which conditional Medicare payments were received must be reimbursed.

- Include in the client's letter of engagement that reimbursement of Medicare medical payments will come from the client's share of any recovery – not from the lawyer's fee. In cases of substantial Medicare payments, alert clients that reimbursement of these benefits will significantly reduce the recovery. Get the client's written consent for the lawyer to pay Medicare's claim from the award.

- If a client disputes reimbursement to Medicare from a recovery received by you, be sure to comply with Kentucky Rule of Professional Conduct 1.15, Safekeeping Property, in resolving the dispute.

- If the client receives the recovery and indicates he intends to ignore Medicare's interest, contact the KBA Ethics Hotline for guidance (SCR 3.530). Protect yourself from an allegation that you assisted a client in conduct that you knew was criminal or fraudulent.

- Ascertain from Medicare how much they are claiming and then attempt to negotiate a reduction. Be sure to conduct the negotiations with Medicare before a case is settled or tried so litigation strategy can be adjusted, if feasible.

- Examine every bill to verify what portion Medicare paid. Be sure that medical expenses not related to the award are not included in the Medicare claim.

- Do not rely on the client to pay Medicare. The safest practice is for the lawyer to pay Medicare from the award before making disbursement to the client.

How Would You Deal With This Situation?

You represent a client in a personal injury action. You agree in writing to honor a doctor's lien in favor of a chiropractor that treated your client. You then receive a check made out to the client from his insurance policy in payment of medical expenses for the injury. You notify the client of the check who promptly discharges you and retains a new lawyer. The new lawyer asks you to forward the check to him. Do you:

- Forward the check to the former client's new lawyer as instructed?
- Inform the chiropractor that the new lawyer is now responsible for payment of his bills?
- Return the check to the insurance company?
- None of the above?

If you forward the check to the new lawyer, are you relieved of your commitment to pay the chiropractor?

The suggested solution is on the bottom of page 5 of this newsletter.

Bankruptcy – Client Trust Accounts

Client's "Don't Worry About It" Gets Lawyer in Big Trouble

Ohio lawyer O'Brien acted with what he considered extra caution to avoid an ethics violation and still ended up with a six-month stayed suspension from practice for aiding a client in concealing assets from a bankruptcy court.

O'Brien represented Unger in the sale of his residence. The $81,000 proceeds from the sale were deposited in O'Brien's client trust account. A week later Unger, represented by another lawyer, filed for Chapter 7 bankruptcy. Unger did not reveal the $81,000 to his bankruptcy lawyer and did not include it in the bankruptcy petition.

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"Maturity: A stoic response to endless reality."
Carrie Fisher

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O'Brien learned of the bankruptcy filing and asked Unger if the $81,000 had been disclosed. Unger responded, "Don't worry about it." Thus, alerted to the potential fraud of concealing assets from the bankruptcy court, O'Brien discussed with two lawyers in his office and an ethics expert whether he could ethically reveal the funds to the bankruptcy court. The expert advised O'Brien that legal ethics prohibited him from revealing the $81,000 to the bankruptcy court, the trustee, or the client's bankruptcy lawyer. Relying on this advice O'Brien did not reveal the assets. He then on Unger's instructions disbursed money from the trust account eight different times, reducing the funds held to approximately $13,000.

Shortly after the bankruptcy court discharged Unger's debts the trustee was informed that O'Brien was holding proceeds from the house sale in his trust account (apparently by a former associate of O'Brien's firm). This led to the trustee demanding immediate remittance of the funds plus an accounting and documentation of the sale of the residence. This caused O'Brien to once again seek advice about revealing this information and was once again told that it was privileged client information. He refused to comply with the trustee's demand leading to a series of court orders that finally caused O'Brien to comply.

The Ohio Disciplinary Counsel then charged O'Brien with several violations of the Ohio Disciplinary Rules that ultimately were reduced to a violation of the rule prohibiting the counseling or assisting a client in conduct that the lawyer knows to be illegal or fraudulent. (In Kentucky the rule is SCR 3.130(1.2(d), Scope of Representation.) In ruling on the case the Ohio Supreme Court found:

> The evidence showed that when respondent ordered the disbursements to be made, he was fully aware of the bankruptcy, harbored the reasonable suspicion that Unger had not disclosed the house-sale proceeds to the bankruptcy court, and had the means to inform himself. Nonetheless, the ledger for the client trust account reveals that respondent ordered eight disbursements totaling $65,189.72 after the bankruptcy filing….
>
> When asked why he made the disbursements at Unger's request under these circumstances, respondent stated, "I had no other option but to distribute the money to him." But respondent also stated that, from his initial knowledge of the existence of the bankruptcy case, he had fully "assumed" that the money in the trust account constituted an asset properly subject to ownership and control by the bankruptcy court and its trustee. As discussed, the board concluded that the house-sale proceeds constituted bankruptcy assets at the filing of the bankruptcy, and we agree with that conclusion.
>
> ….
>
> Only after the bankruptcy trustee discovered the funds and demanded turnover of the money did respondent adopt the different approach of refusing to disburse monies at Unger's direction.

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How Would Your Deal With This Situation?

Suggested Solution: *"None of the above"* and *"No."* In Kentucky the rule is clear that if a dispute arises between a lawyer and client over disbursement of client funds, the disputed amount must be kept separate until the dispute is resolved (preferably in a trust account). Your agreement in writing to honor the chiropractor's claim imposes both an ethical and legal obligation on you to pay the chiropractor if the former client does not. Hold the check in a secure facility until the disputed funds are resolved with the former client or seek a judicial ruling. *See* Kentucky Rule of Professional Conduct 1.15(c); KBA Ethics Opinion E-292 (1985); KBA Ethics Opinion E-383 (1995); and the article *Avoid Malpractice Claims and Third Party Liability by Knowing How to Resolve Disputed Claims for Client Trust Account Funds and Allegations of Improper Disbursement of Funds* in our Fall 2008 newsletter available at lmick.com – click on Risk Management, Newsletters.

"Never be afraid to sit awhile and think."

Lorraine Hansberry

Lawyers Mutual
www.lmick.com

Waterfront Plaza
323 West Main Street, Suite 600
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Bankruptcy – Client Trust Accounts

> We agree with the board that respondent, by disbursing money from the client trust account at Unger's direction, provided active assistance to Unger's evasion of the bankruptcy laws…. We also agree that respondent's conduct was not excused by his belief that the attorney-client privilege prohibited him from disclosing the existence of the house-sale proceeds. Quite simply, respondent could have acted with consistency by *not disclosing* but also *not disbursing* the funds…. Although respondent rejected this course of action initially, he embraced it after the bankruptcy trustee learned of the house-sale proceeds. (*Disciplinary Counsel v. O'Brien*, 120 Ohio St.3d 334, 2008-Ohio-6198, 12/4/2008)

The key risk management lesson to take from this case is when you seek advice on an ethics problem be sure to relate all of the ethics issues involved. O'Brien got the advice he needed concerning privileged client information, but never asked for advice about how to treat the funds held for Unger in his trust account. Had he done so he should have been advised that disputed funds in a trust account should not be disbursed until the dispute is resolved. Kentucky lawyers can call the KBA Ethics Hotline (to be followed up with a written request) for an informal opinion when facing a difficult ethics issue like O'Brien's. A lawyer who complies with the informal opinion will not be subject to discipline "provided the written request clearly, fairly, accurately and completely states such attorney's contemplated professional act." These requests are confidential and represent a form of insurance against disciplinary action (*See* SCR 3.530 for more details about obtaining informal ethics opinions).

Note: For an outstanding review of the malpractice risks of bankruptcy law practice go to www.lmick.com, click on Risk Management, Subject Index, and look for the article "The Elevated Risks Associated with Insolvent Clients" under Bankruptcy